IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 563 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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REHMATKHAN SUMALJI JAT MALEK - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR YOGESH S LAKHANI for Appellant(s) : 1 - 9.

MR.H.M.PRACHCHAK, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 07/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The present nine appellants came to be tried by the Sessions Court, Banaskantha at Palanpur for offences punishable under Sections 143, 147, 148, 149, 326, 325, 323, 302, 504 of the Indian Penal Code and Section 135 of the Bombay Police Act, in Sessions Case No.53 of 1994. They all came to be convicted by the trial Court by judgment and order dated 3/4/1999, for the offences punishable under Sections 302, 143, 147, 148, 149 and 326 of the Indian Penal Code, as well as, under Section 135 of the Bombay Police Act. The appellants are awarded life imprisonment for the murder of Rehmatkhan Jasaji Malek and are sentenced to undergo life imprisonment therefor. The appellants came to be convicted for offences punishable under Sections 148 and 149 of the Indian Penal Code and are sentenced to undergo rigorous imprisonment for a period of six months. No separate sentence came to be awarded by the trial Court for offences punishable under Sections 143, 147 and 326 of the Indian Penal Code. The trial Court ordered the appellants to undergo rigorous imprisonment for a period of six

months and to pay a fine of Rs.100/- each, in default, to undergo simple imprisonment for 10 days for the offences punishable under Section 135 of the Bombay Police Act.

1.1 The trial Court, however, acquitted the accused-persons for the offences punishable under Sections 323, 325 and 504 of the Indian Penal Code with which they were charged.

2. The incident occurred on 8th December, 1993 between 1:00 p.m. and 2:00 p.m. in the agricultural field known as Akliwada, owned by the deceased, located in outskirts of village Varahi. On that day, deceased Rehmatkhan Jasaji Malek had gone to the field for agricultural work alongwith his nephews - Aamirkhan and Abbaskhan. While they were working in the field, it is the case of the prosecution that the appellants came with weapons in their hands and noticing this, Aamirkhan fled away from the place to the village. Whereas, Abbaskhan hided himself in a neighbouring field in which cotton was grown. Aamirkhan went to the town and contacted his another

maternal uncle- Kesarkhan, who happens to be a brother of the deceased. Aamirkhan told Kesarkhan that the assailants were seen by him approaching with weapons in their hands. Kesarkhan, therefore, rushed to the place of incident alongwith Aamirkhan. As per the prosecution case, on seeing Kesarkhan, the appellants got provoked and became angry and ultimately they collectively assaulted Rehmatkhan Jasaji Malek in an indiscriminate manner with their respective weapons. As a result, Rehmatkhan Jasaji Malek fell to the ground and ultimately, succumbed to the injuries. On seeing this, shouts were raised and Umarkhan came to the spot and on seeing him, the appellants fled away with weapons in their hands. It is the case of the prosecution that in the meantime, Aamirkhan had intervened and sustained three incised wounds. The deceased was immediately shifted for treatment at Varahi, but doctor was not available and then, he was taken to Radhanpur. At Varahi when the doctor was not available and it was decided to take the deceased to Radhanpur, Kesarkhan separated himself from the group and went to the Police Station to lodge the F.I.R. On his lodging F.I.R., offence

was registered and investigation started. Upon investigation, the Police having found sufficient material to implicate the appellants, it filed the charge-sheet in the Court of learned J.M.F.C., Radhanpur, who in turn, committed the case to the Court of Sessions and Sessions Case No.53 of 1994 came to be registered.

2.1 As per the prosecution case, accused No.1 (appellant No.1)-Rehmatkhan Sumalji was armed with a ringed stick, accused No.2 (appellant No.2) - Salimkhan Sumalji was armed with a Dharia and accused No.5 (appellant No.5)-Nasibkhan Isabkhan was armed with an axe. Whereas rest of the accused persons were armed with simple sticks.

2.2 The trial Court framed charge at Exh.4, to which the accused persons pleaded not guilty and claimed to be tried. The trial Court proceeded with recording of evidence as led by the prosecution and after recording further statement of the accused persons under Sections 313 of the Criminal Procedure Code and after hearing the learned Advocate for the

accused persons and the learned A.P.P., came to a conclusion on basis of evidence, that the prosecution was not successful in proving the charges for the offences punishable under Sections 323, 325 and 504 of the Indian Penal Code and acquitted them of those charges. The trial Court recorded conviction for rest of the offences charged against the appellants-accused and recorded conviction therefor as stated above. Aggrieved by the said judgment and order recording conviction, present appeal is preferred by the original accused persons, who are referred to in this judgment as the appellants by their respective numbers.

3. We have heard learned Advocate, Mr.Lakhani for the appellants and learned A.P.P., Mr.Prachchak, for the respondent-State. We have examined the record and proceedings in light of contentions raised before us.

4. Learned Advocate, Mr.Lakhani, has raised following contentions.

1. Genesis and sequence of incident is not correctly given by the prosecution while suppressing the correct details.

2. Witnesses-Aamirkhan and Abbaskhan, who claimed to be eye-witnesses could not have been eye-witnesses at all. They are the witnesses who are got up to suit to the requirement of the prosecution to implicate the appellants.

3. Conduct of all three eye-witnesses is not natural and attempt is made to make out a case with the help of unnatural depositions suffering with major defects in form of exaggerations.

4. Umarkhan, though indicated as a person who came to the place when the incident was about to end or soon after the incident, has not been examined by the prosecution as a witness, though he would be an important witness to unfold the truth.

5. The incident has occurred in a manner and at

a time where there was possibility of independent persons having witnessed the incident from the neighboring fields. However, the prosecution has not examined any such independent witness. Only interested witnesses are examined and their versions suffer from various lapses.

6. Investigating Officer, Mr.Pratapsinh has not been examined by the prosecution. Whereas, the prosecution failed to examine Shri K.I. Rathod, P.S.I., as he had expired.

7. The prosecution has not explained presence of knife at the place of incident, which is found when the Panchnama was drawn.

8. It is indicated that none of the weapons allegedly recovered from the appellants was conclusively found to be stained with blood.

9. The injuries found on person of Aamirkhan claiming to be an eye-witness are possible to be

self-inflicted caused only with a view to support the prosecution case, but the evidence as to intervention by Aamirkhan and sustaining injuries in the incident, is doubtful. Whether, he intervened and if yes, whether he sustained injuries with stick or with a sharp cutting weapon, is a matter of doubt as can be seen from depositions of witnesses.

10. As per the evidence of Dr.Gupta, Aamirkhan came to him with a Police yadi. Whereas, the Investigating Officer denies to have issued any such yadi. Even, as per Aamirkhan, he never visited Police Station or obtained any yadi from Police.

11. The claim of the eye-witnesses and their counts on how the incident occurred is far from truth. The incident could not have occurred in the manner in which the witnesses claim to have occurred. It is a matter of doubt whether Abbaskhan was present at the place of incident and took shelter in field of one Sipoi where

cotton plants were grown.

12. According to these witnesses, on seeing the appellants coming, Aamirkhan fled away and went to house of Kesarkhan. It has come on record that house of Kesarkhan was located at a distance of about 3 kilometers from the place of incident. Aamirkhan for going to the house of Kesarkhan was required to cover this distance on feet in a cross-country road and again Aamirkhan and Kesarkhan undertook the same journey for reaching field. It is alleged that till they came, no assault was committed by the assailants and it is only on seeing the Kesarkhan the appellants were annoyed and committed the assault. This theory is highly improbable.

13. After the incident, the deceased was taken in a jeep car belonging to one Mr.Mansuri of Radhanpur. He has not been examined as a witness. No panchnama of his jeep car has been drawn or brought on record and there is no material to show presence or absence of blood in

that jeep car.

14. Clothes of the accused were not stained with blood.

15. The deceased was involved in anti-national and anti-social activities. There were number of criminal cases registered against him. He had number of enemies and therefore, the possibility of some other persons having assaulted the deceased and committed his murder, cannot be ruled out.

16. Having regard to the nature of injuries viz. that none of the injuries were caused on any vital part of the body, intention to commit murder of the deceased cannot be inferred.

17. It is alleged by the prosecution that all nine accused persons pounced on the deceased with their respective weapons and assaulted him in an indiscriminate manner. However, the medical evidence shows that there were three

bruise injuries and one abrasion on person of the deceased, whereas the seven accused persons had sticks in their hands and therefore the allegation of indiscriminate assault by all gets ruled out.

4.1 Mr.Lakhani, therefore, submitted that if the above aspects are considered, it is clear that the prosecution evidence is doubtful and therefore prosecution cannot be said to have established involvement of the appellants beyond reasonable doubt and the benefit of doubt ought to have been given by the trial Court to the accused/appellant. He, therefore, submitted that the appeal may be allowed and conviction may be set aside and the appellants may be acquitted of the charges giving them benefit of doubt.

5. Learned A.P.P., Mr.Prachchak, has opposed this appeal. According to him, the prosecution case is not totally free from doubt but the doubt cannot be said to be reasonable. He has drawn our attention to deposition of Abbaskhan and submitted that there

is no reason to doubt his deposition as his version in examination in chief has remained unshaken even during cross-examination. This witness clearly implicates all the nine appellants and, therefore, the trial Court was justified in recording conviction, which may be upheld. Mr.Prachchak, submitted that not giving name of Abbaskhan as an eye-witness in the F.I.R. by itself is not sufficient to conclude that Abbaskhan was not present at the time of the incident. He has drawn our attention to the recovery Panchnama (Exh.35) which shows presence of blood marks on ringed stick recovered from accused No.1-Rehmatkhan and Dharia recovered from accused No.2-Salimkhan.

5.1 Mr.Prachchak, submitted that in light of decision rendered in case of ***State of Andhra Pradesh Vs. Rayavarapu Punnayya & Anr., reported in A.I.R. 1977 SC 45***, the collective effect of the injuries is to be seen and merely the fact that the injuries were caused on non-vital part of the body would not be so significant in deciding whether it is a case of murder or not ?

5.2 He submitted that the trial Court was justified in recording conviction and the appeal may be dismissed.

6. We have considered rival side contentions and have examined the record of the case from that perspective.

7. The prosecution case is mainly founded on depositions of three persons claiming to be eye-witnesses to the incident. First is Prosecution Witness No.2, Kesarkhan (Exh.28), second is Prosecution Witness No.3, Aamirkhan (Exh.30) and third is Prosecution Witness No.4, Abbaskhan (Exh.31). Prosecution Witness Nos.3 and 4 happen to be nephews (sister's son) of the deceased. Whereas, Prosecution Witness No.2, Kesarkhan happens to be brother of the deceased and in that manner all the three witnesses are close relatives of the deceased. This observation may not be taken to mean that their depositions would be invalidated on that account, but, certainly their depositions wold call for a

closer scrutiny. Before we proceed to examine their depositions and other aspects of the prosecution case, we propose firstly to examine the medical evidence which is in form of deposition of Dr.Rajendra Gupta at Exh.19 and the postmortem notes at Exh.21.

7.1 It is clear from the ocular evidence of Dr.Gupta and the postmortem notes that the deceased had 10 external injuries and out of these 10 external injuries, external injury No.1, external injury No.9 and external injury No.10 were in form of bruises and abrasion over thigh, shoulder and iliac fossa. These are the only injuries referable to hard and blunt substance viz. sticks. The rest of the injuries were in form of incised wounds. We also notice that the incised wound are again on non-vital parts of body. The doctor has opined that the cause of death was due to haemorrhagic shock due to multiple fractures. The doctor has also opined that the injuries were sufficient in ordinary course of nature to cause the death. The internal injuries were corresponding to external injuries as per opinion of the doctor.

During cross-examination, the doctor has stated that the deceased must have bled profusely but, he cannot say as to how long bleeding may have continued.

7.2 Doctor had also examined witness Aamir Ali Khan and had issued certificate at Exh.20. According to the doctor, witness-Aamir had sustained three incised wounds. The injured was brought to him with a Police yadi and gave a history of assault with Dharia. The doctor has, during cross-examination; stated that the injuries were self-inflictable. The injuries found on person of Aamir were fresh. Healing process has not started. The doctor has opined that in about an hour or two the clotting process of blood starts. Doctor said that the patient was brought to him at about 23:50 hours on 8/12/1993.

7.3 It is thus clear from the medical evidence that the deceased had multiple injuries mainly in form of incised wounds with corresponding fracture injuries and then he died because of haemorrhagic shock due to multiple fractures. It is nobody's case

that these injuries were either self-inflicted or accidental. The injuries were sufficient in ordinary course of nature to cause death and therefore, there is no hesitation in concluding that the deceased met with a homicidal death.

7.4 So far as injuries on person of witness-Aamir is concerned, they were three in number and were incised wounds. He gave history of assault with Dharia. The injuries were fresh in nature and according to the doctor, he describes these injuries as fresh, as the healing process had not started. The doctor has also stated that the clotting process of blood would start in about an hour or two of sustaining the injury. The patient was examined by him at about 23:50 hours. This would be relevant while examining the claim of Aamir in the paragraph to follow, who claims to have sustained injury at the time of incident which occurred around 1 to 2 p.m. on that day coupled with other pieces of evidence.

8. Now that the conclusion is that deceased-Rehmatkhan met with an homicidal death, question that

requires to be addressed to is whether the prosecution can be said to have proved causal connection between the appellants and the cause of death between the appellants and the death. For that purpose the prosecution has examined Kesarkhan at Exh.28. This witness is the brother of the deceased. He was at his home when the incident occurred. He says that Aamir came to him rushing and told him that Rehmatkhan Sumalji is approaching the field with stick in his hand and seven to eight companions who are also armed with weapons and therefore he (Aamirkhan) had come to him to inform. The witness, therefore, rushed to the field alongwith Aamirkhan and saw the appellants over there. He names all of them and attributes respective weapons in their hands. He says that they were flinging abuses at his brother Rehmatkhan and got provoked on seeing him. He then says that accused-appellant No.1 inflicted a stick blow on legs of the deceased. As a result he fell down. Appellant No.2 inflicted a dharia blow on hand of the deceased. Accused-appellant No.5 inflicted an axe blow on the deceased and rest of the persons started inflicting stick blows

indiscriminately. As a result his brother (deceased) became unconscious. They brought the deceased in unconscious condition to home. The appellants escaped and in the transaction Aamir sustained injury. The witness says that his brother-in-law, Umar Hussain had also arrived at the place of incident. According to this witness, the incident has roots in an earlier incident between Yusufkhan and his another brother, Salimkhan. The deceased was taken to Varahi Hospital and from there, he was shifted to Radhanpur in a jeep car. The witness says that he went to the Police at Varahi and lodged the F.I.R., which is at Exh.29.

8.1.1 The witness is cross-examined and he says that in village Varahi, there are about 300 houses of their community with additional population of about 8000 persons. It also emerges from his deposition that at the relevant time, all male folk had gone to the fields for work and only he was in the town. He admitted that the field is at a distance of about 1 kilometer from township. He denies that it is at a distance of 2 kilometers. It

also comes out of his deposition that Abbaskhan and Aamirkhan had before going to the field met him and informed him that they were going to the field with the deceased. The witness also states that after reaching the place of incident, he did not notice Abbaskhan, as Abbaskhan had hidden himself, but he noticed Abbaskhan after the appellants went away. Abbaskhan had hidden himself in the field where castor plants standing with a height of about one meter. Witness says that Aamir had told him about Abbaskhan. It also transpires from his deposition that Aamir had told him that accused No.1-Rehmatkhan is likely to commit assault and that he had seen them in the adjoining field. He also told him that on seeing them, he (Aamir) had rushed to him to inform and that at that time Rehmatkhan was ploughing. Witness asserts that while going to the field he did not come across anyone.

8.1.2 Witness says that when he went there, the assailants had cordoned the deceased and his brother was shouting for help. He also says that till the entire transaction was over, nobody came

from adjoining fields. He also admits that till he reached the field, none of the appellant had committed any assault on the deceased, but there was altercation. The appellants inflicted blows on seeing him. However, nobody tried to commit an assault on him and he had not sustained any injury, nor did he intervene. He says that he was at a distance of about 300 to 400 feet and was not able to speak because of breathlessness. The witness says that the deceased had sustained about 30 injuries. He fell down on receiving the first blow inflicted on him by appellant No.1 with ringed stick in both the legs and then he goes on describing various injuries.

8.1.3 Witness says that Umarkhan came from Varahi after about 8-10 minutes of incident. Witness says that his sister had informed Umarkhan about the problem in the field and asked him to go. She had learnt about the incident on hearsay. Witness says that the deceased was taken home in a bullock cart and thereafter in a jeep car. He says that he did not go to Radhanpur, but went to the Police at Varahi.

9. The prosecution has then examined Aamirkhan Alikhan at Exh.30. According to him, he had gone to the field with his deceased maternal uncle, Rehmatkhan and his brother, Abbaskhan. While they were working in the field around 2:30 p.m., he noticed appellant No.1 Rehtmatkhan Sumalji coming towards them in company of about 7-8 persons armed with sticks and dharia. He saw them when they were about two fields away in the field of Fakirmohmmed. He felt that they were coming with an intention to kill and he, therefore, rushed to home. On reaching home, he informed his maternal uncle (Kesarkhan) and they came back to the field; rushing. On seeing them, Rehmatkhan inflicted a stick blow on legs of the deceased. As a result, the deceased fell down, then, accused No.5 inflicted a Dharia blow and thereafter rest of the accused assaulted the deceased with sticks indiscriminately. Witness says that he intervened and accused No.2, Salim inflicted Dharia blows on him. Witness says that the deceased expired on way to Radhanpur. He took treatment at Radhanpur Hospital. Witness says that he was in hospital at

Radhanpur till about 3:00 p.m. on the next day. He left Radhanpur after the dead body was dispatched from Radhanpur. He says that except him nobody had intervened. Abbaskhan did not intervene, nor did Kesarkhan. He, however, admits that in his police statement he had stated that on intervention by him, Kesarkhan and Abbaskhan, accused No.1 inflicted a stick blow on his leg and accused No.2 inflicted a dharia blow on his hand.

9.1.1 Witness says that when he escaped from the place on seeing the assailants for the first time, he had had no conversation either with the deceased or with his brother, Abbaskhan. Witness says that during the entire transaction either while he went to call his maternal uncle, Kesarkhan or while they came back to the place of incident or while they returned to home with dead body, nobody met them in the town.

10. The third eye-witness, Abbaskhan Alikhan is examined at Exh.31. He is a minor witness, aged about 13. But, after assessing his mental status,

the trial Court has administered the oath.

10.1 This witness says that he and his brother-Aamirkhan had gone to the field with deceased-Rehmatkhan Jasaji Malek, who happens to be their maternal uncle. They went at about 8:00 a.m. Around 1:30 p.m., accused No.1 and other accused persons came there, armed with weapons like dharia, axe and stick and therefore, his brother went home to inform. The appellants were at a distance of about 2 to 3 fields of a Sipoi, the witness says that he, therefore, took shelter by hiding himself in a neighbouring field where cotton plants were grown. He says that his brother-Aamirkhan arrived followed by his maternal uncle-Kesarkhan. Then, there was altercation and then the appellants committed the assault on the deceased. Witness says that he had taken shelter in field of Sipoi located on eastern side of their field. He says that the appellants waited for about 10 to 15 minutes and then they started beating the deceased after Aamirkhan arrived. Witness says that Umarkhan had arrived from home. He says that he (Umarkhan) had arrived from a nearby

place on hearing the shouts. Witness says that his statement was recorded on that very night.

11. What emerges from the deposition of these three witnesses is that they all claim to be eye-witnesses. According to Aamirkhan and Abbaskhan, the appellants arrived at the place of incident, armed with weapons, but they halted at a distance for sometime. On seeing them, Aamirkhan rushed home to inform Kesarkhan and Abbaskhan took shelter in a neighbouring field. On being informed by Aamirkhan, Kesarkhan and Aamirkhan came back to the place and on seeing Kesarkhan, the appellants committed the assault on the deceased. At that time, Kesarkhan was at a distance of about 200 to 300 feet. He was short of breath and could not speak. On hearing shouts, Umarkhan arrived and on seeing him, nine assailants ran away.

11.1 The above theory emerges from depositions of three eye-witnesses consistently, but that by itself cannot be treated as gospel truth. The depositions have to be closely examined to ascertain their

credibility. In case of ***Badam Singh Vs. State of M.P., reported in 2005 S.C.C. (CRI.) 861***, it is held that while appreciating evidence, the credibility of the eye-witness is not the consistent amongst them. It is not a sure guarantee of their truthfulness. If in cross-examination Court comes to conclusion that the conduct of eye-witness is such that it renders the case of the prosecution doubtful or incredible or that their presence at the place of occurrence as eyewitnesses is suspect and in such eventuality the court may reject the evidence. The Court, therefore, will have to assess the evidence of these witnesses keeping this principle in mind.

11.2 It has come on evidence vide Exh.65 that the distance between the place of incident and house of Kesarkhan is approximately three kilometers and this distance was required to be covered by Aamirkhan twice and Kesarkhan once. The place of incident is in the field which is approximately of the size of 25 vighas. The distance was therefore required to be covered cross-country.

11.2.1 The claim of Aamirkhan and Abbaskhan that on seeing the appellants coming to the place armed with weapons, Aamirkhan rushed to the house of Kesarkhan and after informing Kesarkhan, Aamirkhan and Kesarkhan came back immediately will have to be tested by applying the probability test. It is highly improbable that a group of persons armed with weapons, who has gone with a common object of either committing assault or committing murder of the deceased would assemble and wait for a time till a person covers a distance of about six kilometers cross-country on legs. It is also difficult to believe that they waited till Kesarkhan arrived and then committed the assault. The say of these three witnesses though consistent is thus highly improbable.

11.2.2 Abbaskhan claims that he took shelter in a field located towards east of the place of incident, on which cotton plants were grown. Whereas, Kesarkhan says that Abbaskhan had taken shelter in a field on which castor plants were grown. Panchnama of the place of incident indicates that the

said field is towards south of the place of incident.

11.2.3 Aamirkhan has admitted in his deposition that he had stated before the Police that he, his brother(Abbaskhan) and his maternal uncle, Kesarkhan, all had intervened and in that transaction he received one stick blow and dharia blow. Against this say of Kesarkhan is that he had not intervened. He was at a distance of about 300 to 400 feet when incident occurred. Thus the version of these two witnesses are inconsistent.

11.2.3.1 Although Aamirkhan says that he was attacked with stick and Dharia. The medical evidence indicates only three incised wounds on his person and no injury that can be attributed to a stick. Aamirkhan had said that because of stick blow, he had fallen down. Obviously, it would be a reasonable to expect imprints of such injury on his person which are found to be absent.

11.2.4 It would be appropriate at this stage to refer to medical evidence where the doctor has

stated that injuries found on person of Aamirkhan were of superficial and self-inflictable. This has to be read in context of the evidence of this witness, who in his deposition speaks of only dharia injuries but who has admitted that his first version before Police was that he received one dharia injury and one stick injury.

11.2.5 The injuries found on person of Aamirkhan has also to be viewed in context of medical evidence that the injuries were fresh when the doctor examined him. Doctor says that he was examined at about 21:50 hours. According to the doctor, the healing process had not started. Doctor says that after an injury is caused, the clotting process would start after about an hour or two. If this is so, the injuries found on person of Aamirkhan must have been caused within less than two hours of his examination by the doctor or there would have been traces of healing process in form of blood clotting if the injuries were caused at the time of incident which allegedly took place about 6-7 hours prior to the examination by the doctor. Differently put, the

injuries were self-inflictable and appear to have been caused after the incident.

11.2.6 It is also an important factor to note that according to the doctor, Aamirkhan was brought to him with police yadi. Whereas, Aamirkhan himself does not speak of having gone to the Police and obtained a police yadi. The matter does not rest there. Police witness, G.H.Solanki (Exh.42) says that he had not sent Aamirkhan with any Yadi. He goes even to the extent of saying that if the doctor says that Aamir had gone with yadi at Exh.43, the doctor is not telling the truth.

11.3 In the opinion of this Court therefore, though the evidence of Aamirkhan, Abbaskhan and Kesarkhan ex-facie appears to be consistent, it does not inspire confidence and gives a picture of window-dressed evidence. The say of Aamirkhan and Kesarkhan that they did not come across anyone while they travelled distance from place of incident to the house of Kesarkhan seems highly improbable. The theory of this witness that nobody came to the rescue

despite raising shouts also seems improbable. This Court takes this view for the reason that admittedly according to Kesarkhan, there are 300 houses of their community in the town with an additional population of about 8000 persons, admittedly male folk had gone to their work then, it is reasonable to expect that just as the deceased and nephews had gone to field for their work, some the owners of the neighbouring field would also be at their work. Even, if they had not gone to a work, in a town with such a population, it is difficult to believe that a person would travel for about six kilometers without coming across anyone.

11.4 In light of above discussion, it is not possible to come to a firm conclusion that the incident was witnessed by Aamirkhan, Abbaskhan and Kesarkhan, as is claimed by them. Their depositions render their evidence doubtful and incredible in light of surrounding circumstances.

12. Apart from the above aspects, the prosecution case suffers from certain other defects

also. The first being that no independent witness has been examined by the prosecution, though probability is shown that there would have been persons working in neighbouring fields. The first Investigating Officer, Pratapsing is not examined and P.S.I., Shri Rathod could not be examined by the prosecution on account of his death. The exact evidence as to how the investigation proceeded has, thus, not come on record.

12.1.1 It is found from the Panchnama drawn at the place of incident that a knife was found lying at the place of incident. There is not even a whisper in evidence to explain presence of this knife or to show what investigation was made in the direction of ascertaining the possibility of use of the knife in commission of the crime, the origin of knife and possibility of someone else involved in the incident.

12.1.2 The evidence of Dr.Gupta (Prosecution Witness No.1) and Police witness, Shri G.H.Solanki (Prosecution Witness No.7) and police yadi in favour of witness, Aamirkhan is self-contradictory.

12.1.3 The weapons recovered from the accused persons do not carry any blood stains, although the Panchnama does indicate presence of stains possibly of blood. However, the F.S.L. Report negatives the same.

12.1.4 There is no investigation on aspect of presence or absence of blood either in the bullock-cart or in the jeep car in which the deceased was taken from the place of incident to home or to Radhanpur.

12.1.5 The clothes of none of the accused persons are found to carry any blood stains.

13. We also notice that all the injuries are found on non-vital part of the body and it was argued by learned Advocate for the appellant that intention to kill cannot be inferred in light of the site of injury. However, we are unable to accept this contention, in view of the view taken in case of ***State of Andhra Pradesh Vs. Rayavarapu Punnayya &***

Anr., reported in A.I.R. 1977 SC 45, particularly paragraph No.39. Where a view has been taken that *the mere fact that the beating was designedly confined by the assailants to the legs and arms or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death will not exclude the application of clause 3rdly of section 300.*"

14. For the foregoing reasons, we are of the view that prosecution case suffers from various defects. The possibility of Aamirkhan, Abbaskhan and Kesarkhan being not present at the time of incident cannot be ruled out. The genesis of the incident and the sequence of incident is also doubtful. The evidence of eyewitnesses therefore, does not inspire confidence. The investigation suffers from various defects and the prosecution has also failed to examine certain witnesses. The prosecution therefore cannot be said to have proved the charges against the appellants to the hilt and beyond reasonable doubt.

14.1 In our opinion, the trial Court has

overlooked these aspects and has, therefore, erred in recording conviction. The conviction cannot, therefore, be sustained.

15. Appeal merits acceptance. Appeal is allowed. The judgment and order dated 3/4/1999 rendered by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.53 of 1994 is set aside. The appellants are acquitted of the charges for which they are convicted. Appellants No.2 and 5 (original accused Nos.2 and 5) are ordered to be set at liberty forthwith, if not required in any other case. Fine, if paid by the appellants, is ordered to be refunded to concerned appellants. Bail bond of the rest of the appellants shall stand cancelled.

(A.L.DAVE, J.)

(BANKIM N. MEHTA, J.)

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